MALAYSIAN REPORTS

P.A. PEREIRA & ANOR. v. HOTEL JAYA PURI & ANOR.

[F.C. (Salleh Abas C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah F.JJ.)
June 21 & July 5, 1983]
[Kuala Lumpur – Federal Court Civil Appeal No. 87 of 1981]

Labour Law – Service charges – Whether part of wages – Whether Employee Provident Fund contributions payable in respect of service charges – Collective Agreement – Industrial Relations Act, 1967, s. 17(2) – Employees Provident Fund Act, 1951 (Act 272), ss. 2 & 7.

Provident Fund – Service charges – Whether part of wages – Employees Provident Fund Act, 1951 (Act 272), ss. 2 & 7.

In this case the appellants applied for a declaration that EPF contributions are payable in respect of service charges collected by the hotel and distributed to the hotel and staff. The application was dismissed in the High Court and the appellants appealed.

Held: (1) the service charges were not "due to an employee under his contract of service". To be so due the money received by or paid to the employee must essentially and juridically be due "from his employer" and this money must before payment to the employee be the property of the employer and must in turn be in the nature of consideration or *quid pro quo* flowing from the employer in return for the service rendered by the employee. This concept of reciprocity is implicit in or rather the concomitant part of the concept of contract of service;

(2) money collected from the hotel customers as service charges and subsequently accounted for and paid to the Hotel employees can under no circumstances be held to be "due" under the employees' contract of service, as customers are not parties to such contract. Hence, they are not wages within the meaning of the EPF Act;

(3) as the service charges are not brought into existence by the contract of service, but as a matter of trade practice levied by the employer on its customers and as the money so collected are kept distinct and accounted for and distributed to all its employees, they do not constitute "wages" within the meaning of the EPF Act so as to attract contributions thereunder.

Cases referred to:–

(1) *Wrottesley* v. *Regent Street Florida Restaurant Ltd.* [1951] 1 All E.R. 566.
(2) *Hotel Biltmore & Ors.* v. *Central Provident Fund Board* [1972] 2 M.L.J. 232.

FEDERAL COURT.

D. P. Xavier for the appellants.
R.R. Chelliah for the first respondents.
Ronald Khoo (*V.T. Nathan* with him) for the second respondents.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the judgment of the Court): The first appellant is a cook employed by Hotel Jaya Puri Berhad (the Hotel). He is also a member of a trade union called the National Union of Hotel, Bar and Restaurant (the Union) which is the second appellant. The Union was accorded recognition by the Hotel and on January 24, 1979 the Union and the Hotel signed a Collective Agreement (the Agreement) valid for three years, commencing from May 1, 1978 to August 30, 1981 dealing with salaries and terms and conditions of service of the Hotel employees and staff. The Agreement was taken cognizance of by the Industrial Court under section 17 of the Industrial Relations Act, 1967 (Act No. 177) and therefore binding on both the Union and the Hotel and by virtue of subsection (2) thereof the rates of wages and the conditions of employment of the Hotel employees specified in the Agreement became part of their contracts of service with the Hotel.

As is customary in hotel and restaurant trade the Hotel charges its customers an additional amount of 10% over and above the billed amount as service charges.

Article 26 of the Agreement makes provisions for collecting, accounting and disposing of these service charges which are as follows:

"ARTICLE 26 – SERVICE CHARGE

Clause (a) The Company shall share in the full 10% service charge collected up to one hundred and twenty three (123) service points and the rest is to be fully distributed to all employees as specified in Appendix 'B'.

Clause (b) The current Restaurant Supervisor and Beverage Supervisor shall continue to be qualified for 9 points on the basis of personal-to-holder only.

Clause (c) (i) An employee while serving his probationary period on promotion on a higher category, the service points applicable to him shall be that specified in Column 'C' of the higher category.

(ii) On confirmation of promotion in the higher category, the employee shall qualify for the service points as specified in Column 'D'.

Clause (d) The Company shall furnish to the Union with two (2) copies of monthly statement of account of service charge payable to employees as follows:

(i) the total service charge collected;
(ii) the total number of service points increased and decreased;
(iii) the total number of service points of all the employees;
(iv) the value of service charges per service point;
(v) the name, designations, individual service points and department."

The first appellant's monthly earnings are made up of (a) salary, which is $445.00; (b) food allowance, which is $40.00; and (c) 5 points service charges which work out to about $230.00. The total amount of his earning is therefore about $715.00 per month. Employees Provident Fund (EPF) contributions are paid in respect of his salary and food allowance, but not in respect of the share of service charges.

As the Union is of the opinion that the service charges are part of the Hotel employees' wages and therefore should attract EPF contributions, it wrote a letter to the Hotel on February 7, 1979 and to the EPF Board on March 6, 1979 maintaining that the EPF contributions must be paid in respect of employee's share of these charges. Both the Hotel and the EPF Board replied to the Union in the negative, contending that the service charges are not part of the employees' wages under the EPF Act, 1951 (Revised – 1982) (Act 272).

To test this case the appellants took out an Originating Summons by which they applied to the High Court for a declaration that EPF contributions are payable in respect of the service charges. This issue came before Vohrah J. He decided in favour of the Hotel and the EPF Board and hence this appeal.

Under Section 7 (1) of this Act, EPF contributions are payable by both an employee and his employer "at the rate respectively set out in the Third Schedule to this Act". A reference to this schedule shows that the rate is based on the "amount of wages for the month" earned by the relevant employee. Thus the question as to whether or not the share of the service charges received by the first appellant and other employees of the Hotel attracts EPF contributions must ultimately depend upon the determination of a preliminary question as to whether that share is "wages" within the meaning of the EPF Act.

Section 2 of the Act defines "wages" as follows:

> "'wages' means the remuneration in money due to an employee under his contract of service or apprenticeship, whether agreed to be paid monthly, weekly, daily or otherwise –
>
> (a)
> (b)
> (c)
>
> together with any allowance payable by the employer to the employee in respect, either explicity or impliedly, of high cost of living:
>
> Provided that ..."

The material phrase in the definition insofar as this appeal is concerned is "remuneration in money due to an employee under his contract of service". We accept that the share of the service charges is "remuneration in money", and we also accept that the Collective Agreement under which the service charges are shared by the Hotel and its employees may by virtue of section 17(2) of the Industrial Relations Act, 1967 be regarded as part of their contracts of service. We are, however, unable to agree that the share of the service charges could be said to be "due to an employee under his contract of service". To be so due, in our opinion, the money received by or paid to the employee must essentially and juridically be due "from his employer" and this money must before payment to the employee be the property of the employer and must in turn be in the nature of consideration or *quid pro quo* flowing from the employer in return for the services rendered by the employee.

This principle of reciprocity is implicit in or rather the concomitant part of, the concept of contract of service. The fact that the definition makes no mention of the sources from which the remuneration is due, in our judgment, is of no legal consequence, because the word "due" itself would not be complete in its meaning unless there is a source from which a certain thing, in this case the remuneration, is due. Since it is "due under his contract of service" it must necessarily be due from his employer because only the employer and its employee are parties to such contract, and no one else, and certainly not the customers of the Hotel who pay the service charges. That being the case, moneys collected from the Hotel customers as service charges and subsequently accounted for and paid over to the Hotel employees can under no circumstances be held to be "due" under the employee's contract of service, as customers are not parties to such contract. Hence they are not wages within the meaning of the EPF Act.

To satisfy the definition the ownership of money paid by the employer as wages is also important. If he pays a sum of money to his employee which from its nature already belongs to the employee such payment cannot be said to be a remuneration due under a contract of service and therefore cannot be wages. On the other hand where the money paid as wages is the property of the employer, such payment certainly satisfies the definition. This is the principle upon which *Wrottesley* v. *Regent Street Florida Restaurant Ltd.*[1] was decided. We accept the principle as being high-

ly relevant to the issue we are called upon to decide in this appeal although counsel for the appellants strenuously submitted to us not to accept it. In *Wrottesley's* case it was held by the Court of King's Bench Division that tips paid to a waiter individually are his property and that if the tips are collected under a system whereby all tips collected would be kept in a box for periodical distribution, such tips become the joint property of the waiters and those entitled to the distributions. Their employer has no title to them at all. Thus when the tips are distributed, the shares received by the employees are not wages for the purposes of Wages Regulation (Unlicensed Place of Refreshment) Order, 1949. Consequently the proprietor of the restaurant who paid wages to his employees below the statutory minimum remuneration prescribed by the Order could not claim the share of tips to be part of his employee's wages.

Applying this principle to the present appeal we must now determine whether the service charges levied and collected by the Hotel are the property of the Hotel or the joint property of the employees and the Hotel.

Undoubtedly the modern practice in the hotel and restaurant business of charging a separate item labelled with such honorific name as service charges is intended to abolish tippings and represents definite steps taken by the management to prevent the customers' monetary appreciation and generosity from being enjoyed by a certain group of employees only – i.e. those who come into direct contract with the customers – whilst other employees are left out from enjoying such bounty. It is with the object of ensuring a fair distribution of this generosity to all employees irrespective of the nature of their duties that the modern practice of levying service charges on customers' bills comes into existence in which the management would collect and distribute them and account for them to its employees. Although a good deal of arguments were addressed to us on the question of obligatory nature of the service charges as opposed to the gratuitous nature of their forerunner, the tippings, we do not think that such a distinction makes any difference. What matters, it seems to us, is the question as to whether the service charges are the property of the Hotel or not.

For this purpose we must now refer to Article 26 of the Collective Agreement. Under this Article which we have already reproduced in the previous paragraph the Hotel is required to –

(1) share all collectable service charges between itself and its employees; and

(2) prepare, maintain and furnish monthly statements of accounts of these charges giving such details as the total amount collected and the share paid over to each employee.

It thus shows that the service charges are intended to be treated as a distinct fund, jointly-owned by the Hotel and its employees. Until distributed no part of the charges belongs to the Hotel or to any of its employees. The fact that the Hotel collects the service charges and later distributes them to its employees and itself does not necessarily make these charges to be the Hotel's revenue or property because it receives them on account only which it would have to render at the end of every month. Thus, the share of the service charges is not "remuneration due from the employer to an employee under a contract of service" and therefore not part of his wages.

Counsel for the appellants next referred us to certain passages in the awards of the Industrial Court in its Cases Nos. 11031-82 and 85/80 to the effect that it has become an accepted practice that in the hotel industry the remuneration of hotel employees consists of wages and a share of the service charges and that the wages are comparatively low because the service charges constitute the main source of the employee's income. Counsel therefore submitted that the share of the service charges must be treated as wages.

With respect we are not persuaded by the submission. We are unable to find any legal principles, short of legislation, that because wages are low or even purposely kept low other parts of the income received by an employee must be treated as his wages also. It may well be that this should be or ought to be the law, but certainly it is not the law as it is which is relevant for this appeal. Further, the fact that the employer makes use of the service charges so as to pay low wages to their employees is also irrelevant and of no consequence and cannot make what is not wages to be wages. To so constitute wages, as we have said earlier the remuneration must be contractual as between the employer and the employees and therefore must be due from the former to the latter under a contract of service. As the service charges are not brought into existence by such contract of service, but as a matter of trade practice levied by the employer on its customers and as the moneys so collected are kept distinct and accounted for and distribut-

ed to all its employees, they do not constitute "wages" within the meaning of the EPF Act so as to attract contributions thereunder; the Collective Agreement purely dealing with the accounting and distribution of the service charges and not with the bringing then into existence.

We were referred to *Hotel Biltmore & Ors* v. *Central Provident Fund Board*,[2] a Singapore case, which decided that a share of the service charges is wages within the meaning of Singapore Central Provident Fund Act (Cap.121). In our view *Hotel Biltmore's* case is not relevant to the present appeal because the definition of "wages" under the Singapore Act seems to be more extensive than that in our EPF Act. The full definition under the Singapore Act is as follows:

"'wages' means the remuneration in money, including any bonus, due or granted to a person in respect of his employment."

The words "including any bonus", "granted" and "in respect of his employment" clearly shows that whatever is earned by an employee, be it money due under his contract of service or not, is "wages", so long as that money is obtained "in respect of his employment". Thus since service charges are earned because of his employment, they must be wages, irrespective of the name by which the moneys are designated. This case is therefore irrelevant for the purpose of determining this appeal.

For the reasons given in the preceding paragraphs, we therefore hold that the service charges not being the property of the Hotel, are not remuneration due from the employer to its employees under his contract of service, and are therefore not wages. Thus the appeal is dismissed with costs and the deposit is to be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Xavier & Co.; R. R. Chelliah Bros.; Shearn Delamore & Co.*

POON GUAN SDN. BHD. v. SEM SIONG INDUSTRIES SDN. BHD.

[F.C. (Wan Suleiman, Abdul Hamid & Hashim Yeop A. Sani F. JJ.) May 24 & July 28, 1983]
[Kuala Lumpur – Federal Court Civil Appeal No. 31 of 1983]

Landlord and tenant – Termination of tenancy – Provision for termination – Closure of bowling alley – Whether termination valid – Damages.

In this case the respondents had leased the premises to the appellants. It was agreed that if the bowling alley of the respondents was closed for reasons beyond their control, they reserved the right to terminate the tenancy by giving three months' notice in advance. The respondents informed the appellants that the bowling alley would be closed and gave notice to the appellants. The evidence showed that the real reason for closing the bowling alley was the heavy financial losses incurred due to bad maintenance and bad location.

Held: unless a contract clearly specifically so provides, the court will not construe an avoiding provision contained in it in such manner as to permit a party to take advantage of a situation brought about by his own act or omission. In this case the appellants were entitled to a declaration that the tenancy agreement had not been validly terminated.

Cases referred to:

(1) *Peter Dixon & Sons Ltd.* v. *Henderson Craig & Co.* [1919] 2 K.B. 778.
(2) *Tennants Ltd.* v. *Wilson & Co.* [1917] A.C. 495.
(3) *Cheall* v. *Apex* [1982] 3 All E.R. 855.
(4) *New Zealand Shipping Company Ltd.* v. *Societe Des Ateliers Et Chantiers De France* [1919] A.C. 1.

FEDERAL COURT.

T. Thomas for the appellants.

P. P. Royan (*A.D. Sidhu* with him) for the respondents.

Cur. Adv. Vult.

Hashim Yeop A. Sani (delivering the judgment of the Court): The appellant as plaintiff in the High Court sought for a declaration that the tenancy agreement (the terms of which are expressed in a letter dated November 9, 1978 – pp. 81-82 of the Appeal Record) had not been validly terminated. The appellant also sought for an injunction to compel the respondent to restore the airconditioning supply, damages for breach of contract and costs. At the conclusion of the trial the High Court dismissed the claim and allowed instead the counterclaim of the landlord (respondent now) for vacant possession and mesne profits. The appeal before us is against that order.